

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	
)	
Second Periodic Review of the)	
Commission's Rules and Policies)	MB Docket No. <u>03-15</u>
Affecting the Conversion)	
To Digital Television)	RM 9832
)	
Public Interest Obligations of TV)	MM Docket No. 99-360
Broadcast Licensees)	
)	
Children's Television Obligations of)	MM Docket No. 00-167
Digital Television Broadcasters)	
)	
Standardized and Enhanced Disclosure)	MM Docket No. 00-168
Requirements for Television Broadcast Licensee)	
Public Interest Obligations)	

ORDER

Adopted: April 28, 2003

Released: April 29, 2003

By the Chief, Media Bureau:

1. The Media Bureau has received three requests related to the DTV simulcast requirements in Section 73.624(f) of our rules.¹ Noncommercial educational television stations collectively request a temporary suspension of the DTV simulcasting requirements as they apply to NCE stations. Paxson Communications Corporation ("Paxson") and Milwaukee Area Technical College ("MATC") request temporary waivers of Section 73.624(f). As discussed below, we grant NCE stations a six-month waiver of the DTV simulcast requirements. We also grant the waiver request of MATC and deny the Paxson waiver request.

2. *Background.* Section 73.624(f) of the Commission's rules requires DTV licensees to simulcast 50% of the video programming of their analog channel on their DTV channel by April 1, 2003. This requirement increases to a 75% simulcast requirement on April 1, 2004, and a 100% requirement on April 1, 2005.² The simulcasting requirement was intended to ensure that consumers enjoy continuity of free over-the-air video programming service when analog spectrum is reclaimed at the end of the transition. The Commission stated that it may be difficult to terminate analog broadcast service if broadcasters show programs on their analog channels that are not available on their digital channels.³

3. In the *Memorandum Opinion and Order on Reconsideration* in the first DTV periodic

¹ 47 C.F.R. § 73.624(f).

² 47 C.F.R. § 73.624(f)(i)-(iii).

³ *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809, 12833, ¶ 56 (1997) ("*Fifth Report and Order*"), *on recon.*, 13 FCC Rcd 6860, *on further recon.*, 14 FCC Rcd 1348 (1998), *recon. dismissed*, DA 99-1361 (rel. July 12, 1999), *recon. dismissed*, FCC 00-59 (rel. Feb. 23, 2000).

review ("*First DTV Periodic Review MO&O*"), the Commission allowed stations subject to the May 1, 2002, or May 1, 2003, digital construction deadlines to operate initially at a reduced schedule by providing, at a minimum, a digital signal during prime time hours, consistent with their simulcast obligations.⁴ The minimum operating hours for these digital stations effectively increases as the simulcast obligations are phased in. Thus, for example, beginning April 1, 2003, a DTV station that was required to be on the air by May 1, 2002, must provide a simulcast digital signal at least 50% of the time it transmits an analog signal and, under the requirements of Section 73.624(b)(1), must also air a digital video program signal during prime time. Along with the simulcasting requirements, the minimum hours requirements step up to a 75% requirement in April 2004, and a 100% requirement in April 2005. Stations that were subject to the earlier DTV construction deadlines (top four network affiliates in the top thirty markets) are required to operate their DTV station at any time that the analog station is operating.⁵

4. In the *Notice of Proposed Rule Making* initiating the second periodic review of the transition to digital television, adopted January 15, 2003 ("*Second DTV Periodic Review NPRM*"), the Commission sought comment on whether it should retain, revise, or remove the simulcast requirement.⁶ Among other questions, the Commission asked whether broadcasters have a market-based incentive to simulcast that makes a simulcast requirement unnecessary. The Commission also asked whether the simulcasting requirement is causing broadcasters to forego creative uses of digital technology, and if something less than the ultimate 100% simulcast requirement would be sufficient to protect analog viewers while allowing for innovation on DTV channels. The Commission also sought comment on how to define simulcasting, and whether the current dates for the phase-in of simulcast requirements are appropriate. The *Second DTV Periodic Review NPRM* did not propose to reduce or eliminate the minimum digital operating requirements that are currently pegged to the simulcast requirements.⁷

5. *NCE Television Stations.* Dow, Lohnes & Albertson, Schwartz, Woods & Miller, the Public Broadcasting Service, and the Association of Public Television Stations (collectively referred to herein as "PBS, *et al.*"), on behalf of NCE TV licensees, request that the FCC temporarily suspend the DTV simulcasting requirements as they apply to NCE stations pending FCC action on the simulcasting issues in the second DTV periodic review proceeding.⁸ The emergency request states that, although many NCE DTV stations will be able to transmit a digital television signal by the May 1, 2003, construction

⁴ *In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 20594, 20598, ¶ 11, (2001), *recon. denied*, 17 FCC Rcd 15978 (2002), *Third Memorandum Opinion and Order on Reconsideration*, 17 FCC Rcd 18571 (2002).

⁵ *Id.* at 20599, ¶ 11. See also 47 C.F.R. § 73.624(b).

⁶ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Public Interest Obligations of TV Broadcast Licensees*, 18 FCC Rcd 1279 (2003). The deadline for filing comments on the *Second DTV Periodic Review NPRM* was extended to April 21, 2003, and the deadline for filing reply comments was extended to May 21, 2003. Order, MB Docket No. 03-15, RM 9832, MM Docket Nos. 99-360, 00-167, 00-168, DA 03-872 (rel. March 26, 2003).

⁷ To the contrary, the Commission proposed that, if the simulcasting requirements in Section 73.624(f) were reduced or eliminated, Section 73.624(b)(1) would be amended to require DTV stations subject to the May 1, 2002, or May 1, 2003, construction deadlines to air, by April 1, 2003, a digital signal for an amount of time equivalent to 50% of the time they provide an analog signal. The digital signal must be aired during prime time hours. This minimum digital operating requirement would increase to 75% on April 1, 2004 (requiring airing of a digital signal for an amount of time equivalent to at least 75% of the time the station airs an analog signal), and to 100% on April 1, 2005. *Second DTV Periodic Review NPRM*, 18 FCC Rcd at 1303, ¶ 68.

⁸ PBS, *et al.*, Emergency Request for Temporary Suspension of DTV Simulcasting Requirements for NCE TV Stations Pending Resolution of Second Periodic Review (March 24, 2003).

deadline, some stations do not yet have in place necessary studio transmitter links ("STLs") or other digital interconnection facilities between their studios and their transmitters to permit them to receive the simulcast programming feed from their studios. According to PBS, *et al.*, some NCE stations also do not yet have the encoding equipment that enables the station to digitize its NTSC programming for DTV broadcast. PBS, *et al.* notes that, unlike commercial stations, which had a minimum of 11 months between the latest commercial DTV construction deadline (May 1, 2002) and the commencement of the simulcasting requirement on April 1, 2003, NCE stations are currently required to complete construction of their DTV facilities and meet the 50% simulcast requirement simultaneously. As a result, NCE stations are required to focus on transmission systems and encoding and STL systems at the same time, a challenge that many NCE stations have found impossible to meet. PBS, *et al.* also argues that, as the Commission is considering whether the simulcast requirements should be retained or modified, it makes sense to suspend temporarily the requirements for NCE DTV stations while these issues are under consideration.

6. We recognize that, unlike commercial licensees, the deadlines to complete construction of digital facilities and to comply with the 50% simulcasting requirement for noncommercial educational licensees were the same. PBS, *et al.* state that many NCE stations will be unable to both begin digital operations and comply with our current simulcasting obligations by May 1, 2003. In light of the burden faced by NCE stations in complying with both the construction and simulcasting requirements simultaneously, and in light of our pending re-evaluation of our simulcasting requirements, we find that good cause exists to grant NCE stations a six-month waiver of the simulcast requirements in Section 73.624(f).⁹ Thus, until November 1, 2003, noncommercial educational television stations will not be required to simulcast on their digital channel the programming that is aired on their analog channel. This six-month waiver of our simulcast requirements will give NCE stations additional time to acquire and install the facilities necessary to meet the simulcast requirement. As the Commission has stated, we will consider granting special relief to NCE stations in certain circumstances, such as those presented here, because of the particular financial difficulties NCE stations face and the assistance they will need in the transition to DTV.¹⁰ Although NCE stations requested a waiver until resolution of the simulcasting issues raised in the *Second DTV Periodic NPRM*, we do not believe it is necessary to grant a blanket waiver to all NCE stations for an indefinite period of time. We believe that a six-month waiver should provide sufficient time for those NCE stations that do not already have simulcasting equipment to obtain and install such equipment. In the event the Commission has not yet acted on the simulcasting issues raised in the *Second DTV Periodic NPRM* by November 1, 2003, and in the event some NCE stations decide to request a waiver for an additional period of time, we will consider those requests at that time on their individual merit. In taking this action we are not making a final ruling on the matters raised for comment in the *Second DTV Periodic NPRM*.

7. This action in no way waives the existing rules regarding the minimum hours of operation on digital channels. Thus, NCE stations must air, by May 1, 2003, a digital signal for an amount of time equivalent to at least 50% of the time they provide an analog signal. In addition, a digital video program signal must be aired during prime time hours. The minimum digital operating requirement increases to 75% on April 1, 2004 (requiring airing of a digital signal for an amount of time equivalent to at least 75% of the time the station airs an analog signal), and to 100% on April 1, 2005. Stations, both commercial and NCE, that have been granted an extension of time to construct their DTV facilities must comply with the minimum digital operation requirements in effect at the time the station commences

⁹ 5 U.S.C. § 553(b)(3)(B). The Commission may waive its rules where good cause is shown. See 47 C.F.R. § 1.3; *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁰ See *Fifth Report and Order*, 12 FCC Rcd at 12852, ¶ 104.

digital operations.

8. *MATC Waiver Request.* MATC, licensee of two noncommercial educational television stations in Milwaukee, Wisconsin, requests a temporary waiver of Section 73.624(f), for an unspecified period of time, to permit it to simulcast the analog programming of both of its NCE stations on one of its associated digital stations, and to use the other digital station to air high definition programming full time.¹¹ MATC states that it has been operating WMVS-DT, associated with WMVS, Channel 10, since early 2000, and that it will comply with the simulcasting requirements applicable to that station. MATC has been granted an extension of time to complete construction of WMVT-DT, associated with WMVT, Channel 36, and expects that station to be on the air in July 2003. MATC states that the waiver it seeks will be needed only at the point that WMVT-DT commences operations.

9. MATC notes that, because it plans, at least initially, to provide its simulcast service on WMVS-DT, which has a larger predicted coverage area than WMVT-DT, each potential DTV viewer of MATC's stations should be able to receive the simulcast programming of both stations. MATC argues that its plan would satisfy the purpose behind the simulcasting requirement and allow MATC to investigate the feasibility in the market of an all-HDTV programming service. MATC also argues that its plan could stimulate the sale of DTV sets in its market, thereby furthering the transition.

10. We find good cause to grant MATC a waiver of the simulcast requirements in Section 73.624(f), pending the issuance of a Report and Order in the second DTV periodic review, to permit it to implement the plan it proposes in its waiver request.¹² We note that, under MATC's proposal, it will be providing simulcast digital service of both of its analog channels to its community. Thus, though not complying literally with the simulcast rule, it will be serving the purposes underlying the rule. By temporarily waiving the current rules, we are permitting MATC to experiment with innovative uses of its other digital channel and to offer additional digital programming to the community. Because MATC has committed to providing simulcasting, in the manner proposed in its waiver request, allowing it to offer additional digital programming to the community, we believe that it is appropriate to grant MATC a longer waiver to implement its proposed simulcasting plan than the waiver given to other NCE stations. In the second DTV periodic review, the Commission will consider, among other issues related to the simulcast requirement, whether the current simulcast rules should be amended to facilitate similar and other innovative uses of digital stations. As in the case of the temporary simulcast waiver granted above to all NCE stations, MATC will be required to comply with the existing rules regarding minimum hours of operation of digital channels.¹³

11. *Paxson Waiver Request.* Paxson, corporate parent of the licensees of twenty-eight commercial DTV stations, requests a one-year waiver of Section 73.624(f), and in particular the minimum operating hours requirements currently pegged to the Section 73.624(f) simulcasting requirements.¹⁴ Paxson notes that regulatory uncertainty remains in two areas central to broadcasters' transition planning: DTV must-carry and DTV simulcasting requirements. Paxson argues that, without cable carriage, adherence to the simulcast requirement will not advance the DTV transition or improve service to television viewers, while placing undue financial and technical burdens on Paxson's DTV stations. Paxson notes that the 50% simulcast requirement that became effective April 1, 2003, represents a four-

¹¹ MATC, Request for Temporary Waiver of DTV Simulcast Requirements (March 20, 2003).

¹² 5 U.S.C. § 553(b)(3)(B). See also, *supra* n. 9.

¹³ See, *supra* ¶ 7.

¹⁴ Paxson Communications Corporation, Request for Temporary Waiver of Section 73.624(f) of the Commission's Rules (March 20, 2003).

fold increase in Paxson's DTV stations' operating schedule, with corresponding increases in the stations' operating costs. Paxson argues that until broadcasters obtain carriage of their DTV signals, it should not be required to expand DTV service beyond prime-time as most viewers will not be able to view DTV broadcasts until cable carriage is achieved. Paxson also notes that the Commission is considering whether to alter or eliminate the simulcasting requirements.

12. We do not believe that it is appropriate at this stage in the transition to reduce or eliminate the mandatory hours of operation of digital stations. Increasing the operating hours of digital stations subject to the May 1, 2002, and May 1, 2003, digital construction deadlines will help further the transition by helping to drive DTV set penetration and encouraging content producers and advertisers to invest in DTV. These stations have been on notice since the November 2001 adoption of the phased-in simulcast requirements in the *First DTV Periodic Review MO&O* that their DTV operating hours must be stepped-up beginning on April 1, 2003. We also do not believe that the required, gradual increase in the hours of digital programming offered to viewers on these stations needs to await finalization of the Commission's separate proceeding regarding mandatory carriage of analog and digital signals during the transition.¹⁵ It is neither appropriate nor necessary to waive or reduce the minimum operating hours of digital broadcast stations, thereby slowing the transition, pending the outcome of that proceeding. Finally, the Commission did not contemplate altering the minimum hours of operation of DTV stations in the *Second DTV Periodic Review NPRM*; therefore, the pendency of that proceeding does not provide grounds for deferring the effective date of the increased operating requirements.

13. **IT IS HEREBY ORDERED** that, pursuant to the authority contained in Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, NCE TV stations **ARE GRANTED** a six-month waiver of the simulcast requirements in Section 73.624(f) of the Commission's rules, 47 C.F.R. § 73.624(f), until November 1, 2003, as described herein.

14. **IT IS FURTHER ORDERED** that the Request for Temporary Waiver of DTV Simulcasting Requirements filed by Milwaukee Area Technical College **IS GRANTED** to the extent described herein.

15. **IT IS FURTHER ORDERED** that the Request for Temporary Waiver of Section 73.624(f) of the Commission's Rules, filed by Paxson Communications Corporation, **IS DENIED**.

16. This action is taken pursuant to authority delegated by Sections 0.61(h) and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61(h), 0.283.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

¹⁵ See, *Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 (2001).